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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1016

FEDERAL POWER COMMISSION,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY, et al.
Respondents.

No. 71-1040

UNITED GAS PIPE LINE CO. AND PENNZOIL UNITED, INC.,
Petitioners,

v.

LOUISIANA POWER & LIGHT COMPANY, et al.
Respondents.

MOTION OF ATLANTA GAS LIGHT COMPANY, ALABAMA GAS CORPORATION, GEORGIA POWER COMPANY, SAVANNAH ELECTRIC AND POWER COMPANY, AND GEORGIA PUBLIC SERVICE COMMISSION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Atlanta Gas Light Company, Alabama Gas Corporation, Georgia Power Company, Savannah Electric and Power Company, and Georgia Public Service Commission

(Southern Consumers) respectfully move for leave to file the attached brief, as *amici curiae* in this case.

Atlanta Gas Light Company (Atlanta Gas) is a public utility organized and existing under the laws of the State of Georgia and is engaged primarily in the purchase, sale, and distribution of gas in 194 cities and communities in Georgia. It provides natural gas service to approximately 675,000 consumers. Alabama Gas Corporation (Alagasco) is a public utility engaged primarily in the purchase, sale and distribution of natural gas in 142 cities and communities in Alabama. It provides natural gas service to over 300,000 consumers. Atlanta Gas and Alagasco are the two largest customers of Southern Natural Gas Company (Southern Natural) and provide the overwhelming majority of service of natural gas from Southern Natural's pipelines to homes, schools, hospitals and other public buildings. Georgia Power Company (Georgia Power) and Savannah Electric and Power Company (Savannah Electric) are public utilities engaged in the generation, transmission and sale of electricity in the State of Georgia. Georgia Power provides service to consumers in 154 of the 159 counties in Georgia, and provides electric utility services to approximately 975,000 consumers. Savannah Electric is engaged in the generation, transmission and sale of electricity in the county of Chatham and part of four other counties in Georgia, and provides electric utility service to approximately 73,000 consumers. The two electric utilities provide the great bulk of electric power supplied to consumers within the State of Georgia for domestic, commercial and other human needs uses. A portion of the electricity thus supplied is generated by the use of natural gas purchased from Altanta Gas, and in turn by Atlanta Gas from Southern Natural. The Georgia Public Service Commission is an agency of the State of Georgia created by the Constitution of that State and charged by the laws of the State of Georgia with the author-

ity and duty of regulating the rates and charges of gas and electric utilities in that State, with exercising general supervision over such utilities, and with protecting the interest of gas and electric consumers in the State of Georgia. These parties, the "Southern Consumers," have requested the consent of the Federal Power Commission, United Gas Pipe Line Company (United), and Louisiana Power & Light Company (LP&L) to the filing of an *amici curiae* brief, and consent has been obtained. Copies of letters evidencing such consent will be filed shortly.

The Southern Consumers receive the bulk of the natural gas which they purchase and consume from Southern Natural. Southern Natural is a large pipeline purchaser of natural gas from United the interstate pipeline whose reduction in gas sales to LP&L is involved in this case. As a result of United's curtailment plan Southern Natural also has suffered a substantial reduction in the supplies it is entitled to purchase under its contract with United.

The Federal Power Commission states in its brief (at 20-21) that the decision of the Court below will increase curtailments to United's wholesale customers (such as Southern Natural) because it will effectively eliminate the Commission's power to curtail deliveries to United's industrial customers. If this interpretation of the decision below is correct, the Southern Consumers will be adversely affected, because it will increase the reductions in gas supply from United to Southern Natural, their main source of natural gas. However, the Southern Consumers do not agree that the decision below requires this result; instead the decision below merely obliges the Commission to observe the procedures specified by the Natural Gas Act to reduce service whether that reduction is applied to industrial users or to wholesale customers. Moreover, the Southern Consumers would be even more adversely affected if this Court were to agree with the broad assertion of the Federal Power Commission that its "comprehensive curtailment jurisdiction"[1]

[1] Brief for Federal Power Commission, at 15.

authorizes it to permit pipelines to reduce unilaterally gas service by a Section 4 rate filing, prior to any hearings, irrespective of whether such filings contravene the pipelines' contractual obligations to transport and sell natural gas to direct and wholesale customers or the terms of prior Commission certificate orders authorizing such sales and transportation.

Cases concerning the limits of the Commission's authority to permit reductions in service to take effect are now pending in several other proceedings before the Commission and the courts.[2] While the brief of the Federal Power Commission asserts that these proceedings will be controlled by the Court's ruling here, we submit that a more orderly judicial proceeding would be strictly to limit the decision here to the facts presented by this case rather than to grant what amounts to a declaratory order. *See Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 243, 9 L. Ed. 2d 291, 296 (1954); *Eccles v. People's Bank of Lakewood Village, California*, 333 U.S. 426, 432, 92 L. Ed. 784, 789 (1948); *Barr v. Mateo*, 355 U.S. 171, 2 L. Ed. 2d 179, 181 (1957). However, if the Court does reach the broader questions presented by the brief of the Federal Power Commission, then it is submitted that the views of the Southern Consumers—who would be adversely affected by the decision below if the Federal Power Commission's interpretation of that decision is correct, but who would be even more adversely affected were the Commission's broad claims of comprehensive "curtail-

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[2] Southern Consumers are appellants and petitioners in proceedings now pending before the United States Court of Appeals for the Fifth Circuit. *Altanta Gas Light Co. et al v. Federal Power Commission*, Nos. 72-1539 and 72-1475, and *Alabama Gas Corp. v. Federal Power Commission*, No. 72-1415. These proceedings were erroneously described by the Federal Power Commission in its petition for a writ of certiorari as collateral attack upon a curtailment plan approved by the Federal Power Commission although the Commission's order suspending such plan made a finding that the "plan may not be lawful," FPC Order, No. RP72-74, p. 2 (December 23, 1971). Subsequent FPC orders specifically disavowed any consideration of the merits of the plan.

ment or plenary jurisdiction" to be sustained—may be helpful to the Court.

Respectfully submitted,

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April 12, 1972

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1016

FEDERAL POWER COMMISSION,
Petitioner,

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LOUISIANA POWER & LIGHT COMPANY, et al,
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BRIEF AMICI CURIAE OF ATLANTA GAS LIGHT COMPANY, ALABAMA GAS CORPORATION, GEORGIA POWER COMPANY, SAVANNAH ELECTRIC AND POWER COMPANY AND GEORGIA PUBLIC SERVICE COMMISSION

OPINIONS BELOW, JURISDICTION, AND STATUTES INVOLVED

The statements of the opinions below, jurisdiction and statutes involved as set forth in the Brief of the Federal Power Commission are not disputed.

STATEMENT

We respectfully disagree with the statement contained in the Brief of the Federal Power Commission in two respects. First, the cases do not involve the jurisdiction of the Federal Power Commission in any ultimate sense to allocate the gas supply of an interstate pipeline company but involve issues concerning the limits of the particular statutory powers vested in the Commission by Congress in this regard. Second, the Court of Appeals did not hold, as asserted by the Commission (Brief at 3) that the Commission "has no curtailment jurisdiction over deliveries of natural gas transported in interstate commerce by an interstate pipeline company to direct customers." The Court of Appeals recognized this jurisdiction but held that the Commission was required to comply with the statutory scheme enacted by Congress in exercising such jurisdiction. (United Pet. Cert., at 15a - 17a)

QUESTIONS PRESENTED

Similarly, we respectfully disagree with the statement of the questions presented as set forth in the Brief of the Commission. In our view, the questions presented are as follows:

1). Whether the powers vested in the Commission with respect to reductions or "curtailments" by any interstate pipeline company and deliveries of natural gas to a direct user differ from its statutory powers respecting the curtailment of deliveries to a purchaser for resale.[1]

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[1] By repeatedly referring to the opposition which has been levelled at its attempts to assert "plenary" jurisdiction over curtailment of deliveries for *direct use*, the Commission, perhaps unintentionally, may

(Footnote continued)

2). Whether the Federal Power Commission may permit a pipeline company through a unilateral filing under Section 4 of the Natural Gas Act to implement a curtailment plan which is in breach of its contractual obligations and prior certificate orders by the Commission, or whether such a plan may be ordered by the Commission only after notice and hearing under Sections 5 or 7 of the Act.

3). Where a pipeline company unilaterally files a curtailment plan in abrogation of its contracts with its customers as well as prior certificate orders of the Commission, which the Commission acting beyond its statutory powers nevertheless permits to become effective, is a customer who thereby suffers immediate and irreparable injury barred from appropriate judicial relief because of the pendancy of proceedings relative to such plan before the Commission.

SUMMARY OF ARGUMENT

Neither the term "curtailment" or "curtailment proceedings" is used in the Natural Gas Act. The Commission claims that its "plenary" and "comprehensive curtailment jurisdiction" (Brief, at 6, 15) is, put most kindly, an attempt to supply by administrative proclamation unbridled

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(Footnote continued from preceding page)

suggest that its "plenary" authority over deliveries for *resale* has a more firm or conceded basis. As will be shown below the same statutory provisions govern the Commission's authority over deliveries for both types of use.

and open-ended authority which the Commission, presumably at its election, may pursue as an alternative to the express powers vested in the Commission with *appropriate procedural safeguards* in specific sections of the Natural Gas Act. The argument for such newly-proclaimed authority is that it is necessary in order for the Commission to deal expeditiously with problems of gas allocation in times of shortage since, in the Commission's view, pursuit of its express powers under the Natural Gas Act would be unduly cumbersome. As the Court below aptly stated:

> Need may be the mother of invention, but need must have the paternal spouse – a legislative grant – to beget agency authority. (United Pet. Cert., at 17a).

The alleged need, however, is more apparent than real. Whatever delay is avoided by the exercise of this "plenary" jurisdiction is possible only by permitting the pipeline companies, acting in their respective self-interests, to regulate gas supply, and not the Federal Power Commission, as intended by Congress. Second, if an emergency arises, which requires immediate action without hearing, adequate tools are available to the Commission, as we shall show below, within the framework of Sections 5 and 7 of the Act which contain the relevant express powers. Third, whatever speed or efficiency allegedly results from transferring regulatory controls to the self-interest of the various pipeline companies is achieved only by inflicting enormous and largely irreparable losses upon the customers of the pipeline companies and the public which they serve, with the attendant disruption of stability in the natural gas industry.

Finally, the plaintiffs below, under the circumstances of these cases, were not barred from the judicial relief sought by the doctrine of exhaustion of remedies.

ARGUMENT

I. THE STATUTORY AUTHORITY OF THE FPC TO AUTHORIZE REDUCTIONS OR "CURTAILMENT" OF GAS DELIVERIES IS THE SAME REGARDLESS OF WHETHER SUCH SALES ARE FOR DIRECT CONSUMPTION OR FOR RESALE.

The Federal Power Commission has construed the decision of the Court below as affording priority in favor of direct consumers of natural gas served by pipeline companies. (Brief for Federal Power Commission at 12-13.) We do not believe that the decision below produces this result, but if it does the decision is obviously contrary to the language and purposes of the Natural Gas Act.

The FPC asserts that its authority over curtailment of deliveries rests upon its jurisdiction over the *transportation* of natural gas in interstate commerce. (Brief for Federal Power Commission, at 23.)[2] The statutory provisions relating to the Commission's jurisdiction over the *transportation* of natural gas are the same for both direct and resale customers. Accordingly, the Commission's authority to permit reductions or "curtailment" is also the same whether such sales are for resale or for direct industrial consumption.

In addition, review of the basic intent of the Act to protect resale consumers supports this position. The Natural Gas Act is obviously designed to afford a greater scope of

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[2] Broad applicability provisions of Section 1(b) of the Act obviously are not designed to furnish a definitive statement of the particular powers of the Commission with respect to the general matters stated in that section. Otherwise, later sections of the Act which limit and define with particularity the specific powers of the Commission with respect to the matters described in Section 1(b) would be meaningless.

protection to public utilities, who purchase gas from interstate pipelines for resale to customers, including homes, schools, hospitals and commercial establishments, than it does for industrial customers, who purchase gas from interstate pipelines for direct industrial consumption. The Act can scarcely be read as providing less protection against reductions in service to utilities than to the industrial customers.

II. THE COMMISSION'S AUTHORITY TO PERMIT REDUCTIONS IN SERVICE MUST BE EXERCISED IN THE MANNER SET FORTH UNDER THE NATURAL GAS ACT.

The cases before the Court arose because of a request by United pursuant to Section 5 of the Natural Gas Act that the Commission issue a declaratory order interpreting an existing tariff provision providing for curtailment of natural gas deliveries due to a shortage of gas. The Commission might have jurisdiction to do this and, *after a hearing*, would be obligated to determine whether the curtailment provision was discriminatory and to prescribe any changes to be observed thereafter. Since its transportation authority extends to all interstate transportation[3] the Commission could reach direct, as well as wholesale customers, in a Section 5(a) order.

The Commission however insists that its powers to exercise "curtailment" authority are granted by Section 1(b) of the Act, and that it cannot discharge such responsibilities if it must proceed under Section 5 or Section 7 after hearings. (Brief for Commission at 26, 31.)

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[3] Panhandle Eastern Pipe Line Co. v. Public Service Comm. of Indiana, 332 U.S. 507 (1947); F.P.C. v. Transcontinental Pipe Line Co. 365 U.S. 1 (1960); *cf.* F.P.C. v. East Ohio Gas Co., 338 U.S. 464 (1950).

The basic question presented by the Commission's assertion in its brief of "plenary," "comprehensive" "curtailment" jurisdiction is not whether it can authorize reduced service; the question which the Commission argues (pp. 26-32) is whether reduced service can be authorized without any hearings, by a unilateral Section 4 tariff change on the part of the pipeline company, whether or not such tariff change is contrary to existing contracts and prior Commission certificate orders. Our concern is with the lack of procedural safeguards in the Commission's approach.

A. If Pipeline Companies May Make "Curtailment" Plans Effective Under Section 4 Tariff Filings, Irrespective of Contracts or Prior Commission Certificate Orders, Reductions In Service Will Be Dictated by The Best Interests of The Pipelines, Rather Than Commission-Approved Plans to Protect Residential and Commercial Consumers

The Commission claims that if it is compelled to hold hearings as required under Sections 5 and 7, prior to authorizing any curtailment, and that if courts can enjoin curtailment orders entered under Section 4 without hearing,

> . . . priorities would turn on the interpretation of contracts by courts and state regulatory authorities

rather than

> . . . the establishment under the Commission's supervision of a rational system of priorities for the allocation of scarce interstate natural gas supplies based on the needs of all customers . . . (Brief For Commission at 13.)

That argument does not withstand analysis. Under the Commission's approach of permitting pipelines to file curtailment plans under Section 4, which can override pipeline contracts and prior Commission certificates, scarce gas supplies will be allocated for the forseeable future in accordance with the best financial interests of natural gas pipeline companies, rather than the interests of the consumers they serve. Any Commission modification to the pipelines curtailment plan will be made only after protracted hearings, scarcely constituting Commission supervision of a rational system of priorities.

1. The Commission Is Unable to Take Effective Action To Protect Gas Consumers Under Section 4 Procedures.

The Commission has recently hald that its power to suspend so-called "curtailment plans" filed under Section 4 is limited to 5 months.[4] The Commission stresses in its brief that curtailment proceedings are lengthy.[5] It obviously therefore will not be possible for the Commission, to decide or even "supervise" the merits of curtailment plans filed under Section 4 within the statutory suspension period. Consequently, curtailment plans as proposed by the natural gas pipeline companies will go into effect prior to hearings or Commission approval, even though they override existing contracts with direct *and* resale customers. Where the contract has been previously approved by the Commission in a certificate proceeding, which is true in almost all cases,[6]

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[4] Order Denying Request of Altanta Gas Light Company for Partial Stay, Southern Natural Gas Company, No. RP72-74 (F.P.C. March 24, 1972).

[5] P. 31. The curtailment proceeding for United has already lasted more than 18 months.

[6] The United case is unique in that it involved a number of direct sales that had not been previously authorized in Section 7 proceedings.

overriding the contract terms likewise contravenes prior Commission certificate orders.

For a given pipeline, the allocation of supplies among its resale and direct customers is the cumulative product of prior certificate cases, in which the Commission has necessarily made the statutory findings that the pipeline was "able and willing properly . . . to perform the service proposed" and that such service was "required by the . . . public convenience and necessity." (§ 7(e).) Accordingly, a rational method of allocation already has been provided by the certification process pursuant to Section 7 of the Act. Any modification of gas allocation should also be effected under this section, specifically Section 7(b), which provides for abandonment of service only after due hearing.

Whenever the Commission permits a pipeline to set aside (by a unilateral tariff filing under Section 4) this previously determined allocation of supplies under contracts and prior certificate orders, it substitutes the pipeline's plan of curtailment for that which the Commission previously determined to be required by the public interest. Since there are no standards whatever in Section 4(d) which are applicable to curtailment filings and which for example would require pipelines to maintain contractual priorities for their *firm* contract requirements or demonstrate why these priorties must be changed in view of the current gas shortage, pipelines are free to make "curtailment" filings which suit their own, rather than the public interest. For instance, such filings may shift supplies from utilities, such as Atlanta Gas and Alagasco, who serve "human needs" customers such as homes, hospitals, schools, public buildings and commercial establishments, in favor of direct interruptible industrial sales which are more profitable to the natural

gas pipeline company.[7] Additionally, there are no standards under Section 4 for determining when a gas supply shortage on a given pipeline exists, so that the need for filing curtailment plans is left to the unbridled discretion of the pipeline.

2. Permitting Pipelines to Override Contracts By Curtailment Plans Will Seriously Impair Stability of Supply Arrangements Relied On By Distributors.

Altanta Gas and Alagasco purchase natural gas under long term contracts previously certificated by the Commission.[8] By making effective the curtailment plan which overrides the existing contracts and which guarantees no firm assurance for any level of deliveries, the distributor is denied the certainty necessary for utility operations. The Commission's claim that its Order No. 431 can authorize pipelines to abrogate existing contracts is squarely contradictory to this Court's holding in *Mobile* that:

> Our conclusion that the Natural Gas Act does not empower natural gas companies unilaterally to change their contracts fully promotes the purposes of the Act. By preserving the integrity of

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[7] This is precisely what has happened in the case of Southern Natural Gas Company, Docket No. RP72-74 where the curtailment plan permits the pipeline to continue service to its interruptible industrial customers at the same time that it "curtails" service to firm resale customers such as Atlanta Gas, whenever such gas is resold by the gas utility to electric utilities, who also are engaged primarily in supplying electric energy human needs to homes, schools, hospitals and commercial establishments.

[8] The last certificate authorization is reported at 42 F.P.C. 944 (1969).

> contracts, it permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. Conversion by consumers, particularly industrial users, to the use of natural gas may frequently require substantial investments which the consumer would be unwilling to make without long-term commitments from the distributor, and the distributor can hardly make such commitments if its supply contracts are subject to unilateral change by the natural gas company, whenever its interests so dictate. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 344 (1956).

If the long term contract for specified volumes of gas can be overridden in favor a system of priorities proposed by the pipeline—which will be in effect for an indefinite period of time—the gas distributor is placed in the position of being responsible as a purchaser for the full contract volumes while being deprived of the ability to enforce that contract to obtain such volumes. The Commission's scheme not surprisingly, is vigorously supported by natural gas pipelines, including Southern Natural (and opposed by customers), because it makes pipeline contracts a one way street, with no mutuality of obligation.

3. The Refund Remedies of Section 4 Are Totally Inadequate to Protect Customers of Pipelines from Unfair Curtailment Plans.

Even in rate proceedings the effectiveness of the refund remedy to protect consumers is limited. *Tennessee Gas Transmission Co. v. FPC* 371 U.S. 145 (1962). In a curtailment case the refund provision is useless. There is no practical way to refund gas. Once a curtailment provision goes into effect, utilities have no way of recouping their losses caused by reduced overall supplies and the

concommitant loss of sales and potential loss of customers.

In times of natural gas shortage the financial interests of the pipeline are served best by shifting gas from lower-priced sales to higher-priced sales, a procedure that is enhanced by the Commission's invitation in Order 431 to ignore contract limitations in curtailment filings. Even though the pipeline ultimately may be required to refund a portion of the demand charge collected from utility customers—for failing to deliver the contract volumes—the ability to sell gas at higher prices to other customers offsets the exposure to refund liability.

While the Commission suggests in its Brief (at 30) that customers might recover damages where an unlawful curtailment plan is placed into effect under Section 4, the Commission lacks any reparation powers under the Act. *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944). Consequently, if damages are to be recovered, it may be necessary to bring civil suits for breach of contract, which the Commission claims cannot be entertained because of its "plenary curtailment jurisdiction." Further the Commission's Order 431 purports to excuse pipelines from performance of contracts rather than exposing them to damages for non-performance.

B. The Commission's Authority Under Sections 5 and 7 Provides Superior Protection for The Public.

The curtailment of gas services is really a question of partial abandonment, *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 177 F. 2d 942, 945 (6th Cir. 1949). Section 4 of the Natural Gas Act is entitled "Rates and Charges, Schedules, Suspension of New Rates." Section 7 is entitled "Extension of Facilities, Abandonment of Service." A curtailment has little to do with rate

changes, yet it is closely related to certificates issued pursuant to Section 7.

Under Section 7 abandonment proceedings, pipelines would be required to specify volumes which they sought to abandon, and the volumes which they would continue to serve. Customers who received reduced gas service could at least know the limits of such reductions. More importantly, the plan may be explored through hearings under § 7, at which customers, their consumers, State regulatory agencies, the Commission staff and other interested parties present evidence and argument which permit the rational determination as to whether the plan is in the public interest. Furthermore, the Commission has broad conditioning powers in Section 7 proceedings which it could invoke to provide a better balance between the interests of pipelines and their customers than is possible under the inadequate refund remedy. Most importantly, once Commission action is taken pursuant to Section 5 or 7, a reviewing court has a record and findings supporting the Commission's actions. If curtailments are permitted without a hearing, the efficacy of judicial review under Section 19(b) of the Act is greatly reduced.

Finally, if a true emergency can be shown, the Commission can issue interim orders under Section 5 or 7. The Commission's authority to issue interim orders under Section 5 is well-settled.[9] Section 7(c) allows issuance of temporary certificates "in cases of emergency, to assure maintenance of adequate service . . . ." The power to prevent physical failures of pipelines is conferred expressly by Section 7, and need not be read into Section 4, as the Commission argues (at 26).

It has long been held that an agency may not modify outstanding Certificates of Public Convenience and Necessity unless such modification is authorized by the

[9] F.P.C. v. Natural Gas Pipeline Co., 315 U.S. 575 (1942).

applicable underlying statutory authority. Where such authority exists, the procedural requirements for modification in such certificates must be carefully followed. *U.S. v. Seatrain Lines, Inc.*, 329 U.S. 424 (1947); *Latham Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954); *C.A.B. v. Delta Air Lines, Inc.*, 367 U.S. 316 (1961). Nowhere in Section 4 of the Natural Gas Act is there any reference to modification of Commission-approved certificates, whereas Section 7(b) of the Act specifically provides procedures for abandoning service previously certificated.

The alleged administrative reasons for selecting Section 4 rather than Section 5 or 7 are by no means compelling. Pipelines have the burden of proof in Section 7 as well as Section 4 proceedings. The Commission's contention that the burden of proof imposed by Section 4 justifies adoption of that procedure fails to note that the same burden is imposed in Section 7 cases.

Equally fallacious is the contention by the Commission that Section 4 filings are essential to obviate inconsistent State regulation. The Natural Gas Act contemplates that the authority of State agencies will be supplemented by Federal *regulation*; it does not contemplate that pipelines subject to such regulation have authority to override local controls[10] with plans not yet approved by the Federal agency.

In sum, the procedures contemplated by Sections 5 and 7, requiring hearings before service can be reduced, are not only mandated by the Act but in the long run will provide the best assurance that the underlying purpose of the Act—to prevent exploitation of consumers at the hands of natural gas companies—will be achieved.[11]

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[10] Panhandle Eastern Pipeline Company v. Public Service Commission of Indiana, 332 U.S. 507 (1947).

[11] "The primary aim of the Natural Gas Act is to protect consumers against exploitation at the hands of natural gas companies." Sunray Mid-Continent Oil Co. v. F.P.C., 364 U.S. 137, 147 (1960).

III. THE COURTS HAVE JURISDICTION UNDER THE CIRCUMSTANCES OF THESE CASES TO ENJOIN COMMISSION ORDERS THAT EXCEED THE AUTHORITY AND VIOLATE PROCEDURAL REQUIREMENTS PRESCRIBED BY THE NATURAL GAS ACT.

The Commission argues in this case that there should be absolutely no judicial review of the unilateral filing of curtailment proposals by pipelines that the Commission has permitted to become effective while protracted proceedings before the Commission relating to these proposals are pending.[12] Contrary to the Commission's argument, the Court below used Professor Davis' three-part test and properly held that the courts could consider the issues presented at that time.[13] The test referred to the following three factors in determining court jurisdiction: extent of injury in pursuit of administrative remedy; degree of apparent clarity or doubt about administrative jurisdiction; and involvement of specialized administrative understanding in the question of jurisdiction.

Application of Professor Davis' test necessitates the conclusion that judicial relief was appropriate despite continuing proceedings before the Commission. First, it is quite clear that Southern Consumers and many others will stand to lose millions of dollars from loss of sales and permanent loss of customers and loss of gas as fuel if curtailment plans are permitted to go into effect under Section 4 before any hearing on these matters. Much of these losses will probably be passed on to electric utilities and consumers, since the utilities will be required to utilize more expensive alternate

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[12] Taking the Commission's argument to the extreme, courts would be powerless to act even if the pipeline filed a plan providing for curtailment of customers whose name begins from "A-H", and no curtailment for all others.

[13] United Pet. cert. at 26a. *See* 3 K. *Davis, Administrative Law Treatise*, Section 20.03 (1958).

fuels and since some of these utilities might be forced, because of the loss of gas, to install extremely expensive pollution control equipment. Secondly, a Commission curtailment order under Section 4, before any hearing, which overrides prior contracts and certificates is clearly in excess of the Commission's authority, as shown in the preceding section of our argument. Pipeline curtailment plans that violate not only the Natural Gas Act, but also deprive various pipeline customers of property rights without due process of law, in violation of the Constitution, could be insulated from judicial scrutiny if the Commission's position is sustained. Not only are curtailments implemented before any hearings under the Commission's program, but curtailment proposals are filed under the vague standards of Order No. 431, which was also issued without a hearing.[14] Finally, whether curtailment proposals are sanctioned by contracts between pipelines and their customers (and even whether they are sanctioned by Commission certificate) are primarily legal issues which courts are better qualified to deal with than the Commission. *Texas Gas Transmission Corp. v. Shell Oil Co.*, 363 U.S. 263, 270 (1960).[15] Moreover, it is not reasonable to assume, as the Commission contends, that courts will exercise their equitable powers in curtailment cases in a manner injurious to the public, particularly where the Commission and other public bodies can intervene. Obviously, much greater injury to the public would result from the alternative advanced by the Commission of permitting private and unrestrained allocation of gas supply by the pipeline companies themselves.

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[14] FPC Order No. 431 cannot validly operate to deprive the parties of a hearing that is required by Sections 5 and 7 of the Act. See Moss v. C.A.B., 430 F.2d 891 (D.C. Cir. 1970).

[15] The Commission has conceded in past orders that its policy is to defer action on contract questions on jurisdictional matters which are pending in court, Rowan et al. v. Allied Chemical Corp., 39 F.P.C. 64 (1968); L.E. Smith et al., 37 F.P.C. 78 (1967).

The Supreme Court has recognized that inadequacy of remedy is a sufficient basis for not requiring the pursuit of exhaustion of administrative remedies. *Township of Hillsborough v. Cromwell*, 326 U.S. 620 (1946); *U.S. Alkali Export Assn. v. U.S.*, 326 U.S. 196, 210 (1946); *Waite v. Macy*, 246 U.S. 606 (1918); *McNeese v. Bd. of Education*, 363 U.S. 668 (1963). Moreover, one need not exhaust administrative remedies where the agency is acting in excess of its statutory powers. In such cases, courts have jurisdiction to enjoin agency orders. *Skinner & Eddy Corp. v. U.S.*, 249 U.S. 447, 462 (1919); *Leedom v. Kyne*, 358 U.S. 184 (1958); *Deering Milliken, Inc. v. Johnston*, 295 F. 2d 856 (4th Cir. 1961). In *United Gas Pipe Line Co. v. F.P.C.*, 181 F. 2d 796 (D.C. Cir. 1950), the court refused to review a rule, issued without a hearing, under Section 19 of the Natural Gas Act. It said, however, that if any agency is acting illegally and threatening irreparable injury, action in the District Court for injunction will lie.

Section 10 of the Administrative Procedure Act, 5 U.S.C. Sec. 706(2)(c) & (d), supplements the statutory review procedure of the Natural Gas Act and other administrative acts when agency action exceeds its authority and does not follow proscribed procedure. *Abbott Laboratories v. Gardner*, 386 U.S. 136 (1967); *Bucks County Cable TV v. U.S.*, 299 F. Supp. 1325, 1333-4 (1969), *rev'd on other grounds* 426 F. 2d 438 (D.C. Cir. 1970), *cert. denied* 400 U.S. 831 (1971); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Barlow v. Collins*, 397 U.S. 159, 165-8 (1970); *Data Processing Service v. Camp*, 397 U.S. 150, 157 (1969).

CONCLUSION

Southern Consumers believe this Court should not decide the Commission's entire "curtailment powers" in this case because of its unique factual setting. However, if the Court reaches the broader questions urged upon it by the

Commission, it should find that the Commission has *equal* jurisidction to curtial services to direct users and purchasers for resale under Sections 5 and 7 of the Natural Gas Act, but that it cannot authorize natural gas pipeline companies to abrogate or reduce their contractual obligations by unilateral filing of curtailment plans under Section 4 of the Act. Finally the Court should not preclude a suit for injunction or other relief in the District Court, where a pipeline company unilaterally files a curtailment plan that violates its contracts with its customers as well as prior certificate orders of the Commission, which the Commission acting beyond its statutory powers nevertheless permits to become effective.

Respectfully submitted,

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April 12, 1972

CERTIFICATE OF SERVICE

I, John E. Holtzinger, Jr., an attorney for the parties aforementioned, hereby certify that I have served a copy of the foregoing Motion and Brief Amici Curiae upon the parties to this action by delivering a copy of the same by air mail special delivery to the attorneys of record for such parties.

This 12th day of April, 1972.

John E. Holtzinger, Jr.